

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 667.

**LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVI-
GATION COMPANY, LIMITED, APPELLANT,**

vs.

**ANDREW W. MELLON, SECRETARY OF THE TREASURY
OF THE UNITED STATES, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.**

FILED OCTOBER 27, 1922.

(29,217)

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Equity Subpœna.

The President of the United States of America to Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Liverpool, Brazil and River Plate Steam Navigation Company, Ltd., and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you, of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 19th day of October, in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and forty-seventh.

ALEX GILCHRIST, JR.,
Clerk.

BURLINGHAM, VEEDER, MASTEN &
FEAREY,
Complainant's Sol'rs.

The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX GILCHRIST, JR.,
Clerk.

2 In the District Court of the United States for the Southern District of New York.

In Equity.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainant, Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., brings this its bill of complaint against the above named defendants, and respectfully shows as follows:

I. Complainant, Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., is a corporation duly organized and existing under the laws of Great Britain and Ireland, with its principal place of business in England.

II. Complainant is informed and verily believes and thereon alleges on information and belief:

The defendant Andrew W. Mellon is Secretary of the Treasury of the United States, and he is, and his subordinates are, by law charged with the duty of enforcing the terms and provisions of the

Acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States and the making of Regulations, promulgated for the purpose of enforcing such acts of Congress.

The defendant Henry C. Stuart is a subordinate of said Secretary of the Treasury and is Acting Collector of Customs for the Port of New York, and said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury, which from time to time may be promulgated, within the Port of New York wherein the complainant desires to bring its vessels equipped with certain sea stores as hereinafter set forth.

The defendant Ralph A. Day is a subordinate of the said Secretary of the Treasury and is the Prohibition Director for the State of New York, which State embraces that portion of the Port of New York wherein the complainant desires to bring its vessels equipped as aforesaid, and said defendant is by law charged with the duty

enforcing the terms and provisions of the Acts of Congress passed under authority of the Eighteenth Amendment to the Constitution of the United States and regulations of executive departments of the United States Government promulgated for the enforcement of such Acts of Congress.

The defendant John D. Appleby is a citizen and resident of the State of New York and is Zone Officer for this Zone, and said defendant is by law charged with the duty of enforcing the terms and provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury hereinbelow referred to, and has jurisdiction in the Port of New York, both in the States of New York and New Jersey.

III. This is a suit of a civil nature arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three thousand dollars (\$3,000) in value, exclusive of interest and costs.

IV. Complainant is a foreign corporation organized under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business, and for very many years has been engaged in the business of transporting, as common carrier, passengers and cargo for hire on the high seas, and in transacting such business the complainant maintains and operates fleets of steamships in overseas trades between ports of the United States and ports in Brazil, the Argentine Republic and England.

All of the complainant's steamships are British vessels flying the British flag. The complainant owns fifty passenger and freight steamers of a total gross tonnage of about 450,000. Of these steamers four passenger vessels of a total gross tonnage of 44,521 tons, and the average six freight steamers, of a total gross tonnage of about 4,000 tons, trade regularly between South American ports and the Port of New York. There is also a cargo steamer which trades regularly between New York and Manchester, England, and others of the complainant's said vessels are frequently calling at United States ports. Complainant's said steamers thus trading to the United States are worth many millions of dollars, and any interruption of their service causes great loss and damage to the complainant, the extent of which it is impossible to estimate. Regular passenger service is maintained between New York and ports in Brazil and the Argentine Republic, and regular freight service is maintained between New York and ports in Brazil and the Argentine Republic and also between New York and the port of Manchester, England. Complainant's principal office in the United States is located in the City of New York, and complainant occupies piers in the Port of New York in Brooklyn and at Hoboken. It also has offices in a number of other ports of the United States.

V. The crews operating complainant's vessels, including those carrying passengers and cargo and those carrying cargo alone, are made up almost entirely of citizens of countries other than the United States, under the laws of which countries the use of alcoholic

liquors for beverage purposes is not prohibited and by whose customs the use of alcoholic liquors for beverage purposes is so widespread that complainant believes it would experience the greatest difficulty in obtaining adequate crews to operate their vessels running to the United States, if they were prohibited from furnishing a usual and reasonable amount of liquor to members of the crews.

VI. A considerable proportion of the passengers travelling to and from the United States by complainant's ships consist of through passengers from one foreign country to another by way of the United States. As those passengers are largely foreigners, accustomed to the use of wines and liquors with their meals, if complainant is prevented from furnishing wines and liquors to them while on the high seas, it believes they will travel by steamers of other lines not touching at United States ports.

VII. The prohibition of the use of alcoholic liquors on complainant's vessels as sea stores, for the reasonable use of crew and passengers, it is believed would cause your complainant great pecuniary loss by reason of the difficulty of obtaining crews, and would cause an annual loss of receipts from passenger business of many thousand dollars a year, and will involve irreparable damage to your complainant, in that it will destroy a considerable part of its business and render a considerable part of its equipment useless and cause a loss of its profits.

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VIII. It has at all times heretofore been the practice of complainant's vessels, in common with other British vessels, to carry as part of their sea stores certain wines, liquors and other intoxicating beverages for consumption by the vessel's passengers and crew, such sea stores, including such wines, liquors and other intoxicating beverages, being the property of the complainant and on board solely for such consumption on board and not for transportation or landing in the United States or elsewhere, and upon arrival of any vessel in the United States an accurate list of all such sea stores, including such wines, liquors and other intoxicating beverages, being furnished to the United States authorities. None of the intoxicating liquors so kept as sea stores for reasonable use of passengers and crew have been manufactured, sold or transported within, imported into or exported from the United States or any territory subject to the jurisdiction of the United States. All wines and other intoxicating liquors kept as sea stores on complainant's vessels as aforesaid have been legally acquired.

Since the adoption of the so-called National Prohibition Act of October 28, 1919, complainant's ships have been permitted freely to come and go in the port of New York and other ports and territorial waters of the United States with such sea stores, including such wines, liquors and other intoxicating beverages, on board, under regulations of the Secretary of the Treasury hereto annexed and marked Schedules A and B, and reference thereto is prayed. Reliance upon and under the authority of the above mentioned

7 Treasury decision and the regulations promulgated in connection therewith and the procedure always followed as above described, complainant in good faith purchased in foreign ports and now has on board its vessels on the high seas bound for the United States, as sea stores, quantities of intoxicating liquors of a value in excess of Three thousand dollars (\$3,000.). The complainant has at all times been ready and willing to conform to, and has conformed, to such regulations, and upon arrival of any of complainant's vessels within the jurisdiction of the United States such vessel has immediately been boarded by the United States customs officials, who thereupon placed such wines, liquors and other intoxicating beverages under seal and assumed exclusive control thereof until the same were unsealed by such customs officials upon the vessel's again leaving the jurisdiction of the United States.

IX. All of the alcoholic liquors carried as such sea stores on complainant's vessels are produced and manufactured in countries other than the United States or territory subject to its jurisdiction. All such liquor for sea stores is taken on board complainant's vessels at foreign ports, and no part of such liquors is intended to be landed in the United States.

X. On or about October 5, 1922, as complainant is informed and believes, the Attorney General of the United States transmitted an opinion to the Secretary of the Treasury in which, among other things, he stated that the sale, transportation or possession of intoxicating liquors for beverage purposes on foreign vessels while in territorial waters of the United States is prohibited by said National Prohibition Act. Thereafter, the President of the United States directed that said National Prohibition Act be enforced in accordance with said opinion of the Attorney General, and directed the Secretary of the Treasury to proceed to the formulation of regulations for the enforcement of said law in accordance with said opinion of the Attorney General with respect to foreign ships.

Complainant is informed and believes that the defendant, the Secretary of the Treasury, or officials of his Department, acting under his direction, are proceeding to formulate regulations to prevent the carriage of all intoxicating liquors for beverage purposes as sea stores for crew and passengers on foreign vessels entering ports of the United States and threaten to enforce said Prohibition Act as interpreted by the Attorney General. By order of the President of the United States, as complainant is informed and believes, the said regulations will not apply to foreign vessels sailing for the United States on or before October 14. The complainant's passenger steamer Van Dyk, however, sails from Trinidad for the United States on or about October 21, calling at Barbados, and the complainant's steamer Vestris is expected to sail from Buenos Aires toward the United States on or about October 21, and others of complainant's vessels will shortly from time to time thereafter be sailing from foreign ports for the United States, and, unless restrained, the defendants intend, as complainant is informed and believes, upon arrival of said vessels within the

United States, to seize all wines, liquors or other intoxicating beverages on board and included in the sea stores of said vessels, and threaten also to seize the vessels themselves as being in violation of said National Prohibition Act and subject to the penalties therein provided; and any such seizure of said wines, liquors or other intoxicating beverages constituting part of said sea stores of said vessels for use and consumption of passengers and crews as aforesaid, or seizure of said vessels themselves, will disrupt the sailings of complainant's vessels, prevent the performance of obligations incurred in respect thereof, deprive the complainant of a large

9 volume of patronage, and otherwise cause loss, damage and difficulties to the complainant, to its great and irreparable loss and injury, and will deprive complainant of its property without due process of law.

XI. Complainant is advised by counsel, and verily believes, that the aforesaid ruling by the Attorney General in respect to foreign ships carrying intoxicating beverage liquors as ships' stores for crew or passengers as aforesaid, and any regulations formulated by the Secretary of the Treasury for the enforcement of such ruling, are and will be unauthorized and void because neither the Eighteenth Amendment nor the National Prohibition Act prohibits the carriage of such liquors as such sea stores for crew and passengers as aforesaid, and an interference with the carriage of such sea stores would, therefore, violate complainant's rights under the law and under existing treaties between the United States and Great Britain; and also would deprive complainant of its property without due process of law.

XII. Complainant is advised by counsel and verily believes, that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders said Act unconstitutional and void, for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional and also would deprive complainant of its property without due process of law.

XIII. Complainant alleges that the defendant, Andrew W. Mellon, or his subordinates, are preparing regulations, and that pursuant to said opinion of the Attorney General or such regulations, the defendant Andrew W. Mellon, as Secretary of the Treasury, and the defendants Henry C. Stuart, Ralph A. Day and John D. Appleby are threatening, notwithstanding the fact that the interpretation of the Act of Congress, known as the National Prohibition Act, by the Attorney General is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act, if it purports to prohibit the carriage of said alcoholic beverages as sea stores for

crew and passengers, is unconstitutional and void for the reasons hereinabove stated, to seize said alcoholic liquors not constituting sea stores on complainant's vessels, and to enforce against the complainant, its officers, agents and servants, various pains and penalties, including fines and imprisonment, and various forfeitures of property provided by the Acts of Congress and regulations, and thus involve the complainant, its officers, agents and servants in numerous suits and by such threats to prevent complainant, its employes and servants, from carrying out its contracts, and thus deprive the complainant of its business and of its property without due process of law; all to the irreparable damage of complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it were forced to bring an action at law to relieve its employees and property from such penalty and forfeiture.

Forasmuch, therefore, as complainant is without remedy in the premises, except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above named defendants and each of them be directed to make a full, true and perfect answer to this bill of complaint, but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants, subordinates and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or cause to be enforced against the complainant, its officers, servants and employees, or any of them, or complainant's steamships, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress, or any rules or regulations of the Secretary of the Treasury, promulgated to carry into effect the said opinion of said Attorney General, and from arresting and prosecuting the complainant, its officers, agents, servants or employees, or any of them, and from refusing to issue to the complainant and/or its steamer permits for clearance from the port of New York, or in any way interfering with the arrival or departure of the complainant's steamers, for or on account of any alleged violation by them, or any of them, of the Eighteenth Amendment, or the National Prohibition Act, on the ground or claim that the carriage or possession of said intoxicating liquors as aforesaid as sea stores for crew and passengers is contrary to law; or from molesting or otherwise interfering with the complainant in the peaceful possession of said intoxicating liquors on board such vessels as part of their sea stores.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause, whereby the defendants, their agents, servants, subordinates and employees, and each and every one of them be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein directed to said defendants, commanding them on a day set, to appear and answer the bill of complaint herein.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM
NAVIGATION COMPANY, LTD.,
By DAVID COOK,
Agent.

BURLINGHAM, VEEDER, MASTEN &
FEAREY,

Solicitors for Complainant.

27 William Street, Borough of Manhattan, New York City.

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SCHEDULE A.

(Copy.)

(T. D. 38218.)

Sea Stores—Liquors.

Liquors properly listed as sea stores should be kept under seal while vessels are in port. Excessive or surplus quantities should be seized and forfeited.—Articles 106 and 107 of the Customs Regulations of 1915 as amended.

Treasury Department, December 11, 1919.

To collectors of customs and others concerned:

All liquors which are prohibited importation, but which are properly listed as sea stores on vessels arriving in ports of the United States, should be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes.

Excessive or surplus liquor stores are no longer dutiable, being prohibited importation, but are subject to seizure and forfeiture.

Liquors properly carried as sea stores may be returned to a foreign port on the vessel's changing from the foreign to the coasting trade, or may be transferred under supervision of the customs officer from a vessel in foreign trade, delayed in port for any cause, to another vessel belonging to the same line or owner.

Articles 106 and 107 of the Customs Regulations of 1915 are amended accordingly.

(Signed)

JOUETT SHOUSE,
Assistant Secretary.

(99623.)

14

SCHEDULE B.

(Copy.)

(T. D. 38248.)

Sea Stores—Liquors.

Opinion of the Attorney General with respect to the practice under T. D. 38218 of sealing liquors listed as sea stores on vessels while in ports of the United States. Distinction made between American and foreign vessels. T. D. 38218 amended.

Treasury Department, January 27, 1920.

To Collectors of Customs and Others Concerned:

Attention is invited to the appended copy of an opinion rendered by the Department by the Attorney-General with respect to the practice under T. D. 38218 of sealing liquors carried as sea stores on all vessels while in the ports of the United States, as indicated by the questions submitted to him.

Following the opinion of the Attorney-General the first paragraph of T. D. 38218 is hereby amended to read as follows:

All liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, should be placed under seal by the Boarding Officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purposes. All such liquors on foreign vessels should be sealed on arrival of the vessel in port, and such portions thereof released from time to time for use by the officers and crew.

The other provisions of T. D. 38218 are not affected by the Attorney-General's opinion, and therefore remain without modification.

JOUETT SHOUSE,
Assistant Secretary.

(198377.)

STATE OF NEW YORK,

County of New York, ss:

David Cook, being duly sworn, says: I am Managing Agent at New York for Liverpool, Brazil & River Plate Steam Navigation Company, Ltd. I have read the foregoing bill of complaint and know the contents thereof and the same is true to the best of my knowledge, information and belief. The sources of my knowledge and the grounds of my belief as to all matters in said bill of complaint not stated to be on my knowledge are an examination of documents and other papers in my possession relating to the subject matter of this suit. The reason why this verification is not made by complainant is that it is a foreign corporation.

DAVID COOK.

2-667

Sworn to before me this 18th day of October, 1922.

[SEAL.]

EDWIN M. BRENGLE,
Notary Public, Queens Co., No. 3072.

New York Co. Clerk's No. 856. Reg. No. 4613.
Commission Expires March 30, 1924.

16 & 17 SIR:

Take notice that the original B/Complt. of which the within is a copy, was this day duly filed herein in the office of the clerk of this court

Dated, New York, 10-19-22.

Yours, etc.,

BURLINGHAM, VEEDER, MASTEN &
FEAREY,
Proctors for —.

27 William Street, Borough of Manhattan, New York City.

To — — —, Proctor for —.

[Endorsed:] E-25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil and River Plate Steam Navigation Company, Ltd., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Bill of Complaint. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

18 U. S. District Court, Southern District of New York.

E. 25/33.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY
LTD., Complainant,

versus

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

Notice of Appearance and Demand.

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of copy of the complaint and all papers in this action upon me, at

office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours,

WILLIAM HAYWARD,
*United States Attorney,
Attorney for Defendant.*

New York, October 20, 1922.

To Messrs. Burlingham, Veeder, Masten & Feary, 27 William Street, Attorney- for Plaintiff.

19 & 20 [Endorsed:] U. S. District Court, Southern District of New York. Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., versus Andrew W. Mellon, et al. Notice of Appearance. William Hayward, United States Attorney, Attorney for Defendant. Due service of a copy of the within Notice is hereby admitted. Dated the 20 day of October, 1922. — — —, Plaintiff's Attorney. To Messrs. Burlingham, Veeder, Masten & Feary, 27 William Street, Plaintiff's Attorney.

21 In the District Court of the United States for the Southern District of New York.

E. 25-33.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

Answer to Bill of Complaint.

Now come the defendants herein and in answer to the bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the bill of complaint herein and every part thereof be dismissed, and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.

2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.

3. The bill does not present a cause of action in equity under the Constitution of the United States.

4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

22 Second. In answer to the allegations set out in paragraph seventh of the complaint the defendants allege on information and belief that any difficulty which complainant might experience in obtaining adequate crews from among the nationals of countries in which the custom of the use of alcoholic liquors for beverage purposes is widespread would be readily obviated by the payment of higher wages to said crews. Defendants are further informed and believe that many of the vessels of the American merchant marine carry crews, a portion of whom come from nations accustomed to the use of alcoholic beverages and that the said American vessels have never had the least difficulty in obtaining adequate crews from the nationals of such countries at the same wages paid to American crews.

Third. Defendants deny the allegations contained in paragraph eleventh of the bill of complaint that the ruling by the Attorney General referred to in said paragraph is and any regulations for the enforcement of such ruling are and will be unauthorized and void. Defendants further deny the allegation that such ruling and such regulations would violate complainant's rights under existing treaties between the United States, Great Britain and otherwise.

Fourth. Defendants deny the allegation contained in paragraph twelfth of the bill of complaint that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is correct, it renders said Act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon, and in the exercise of, the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States, and that if the National Prohibition Act

23 purports to make possession anything more than a presumption of a violation of the said Act, it is unconstitutional.

The defendants allege on the other hand that it is well within the powers of Congress delegated to it by the Eighteenth Amendment to the Constitution of the United States to declare the possession of intoxicating liquor to be unlawful and that such legislative declaration contained in the National Prohibition Act is a valid exercise of the legislative power and has a reasonable relation to the enforcement of the constitutional mandate.

For a separate and distinct defense herein, defendants allege:

Fifth. Defendants re-allege and re-affirm as part of this separate and distinct defense each and every allegation contained in paragraphs First to Fourth above.

Sixth. Defendants are informed by their attorney and therefore allege that if the complainant is correct in its construction of the National Prohibition Act the implications involved are exceedingly serious and the claim of the complainant, if allowed, would carry with it as a necessary corollary the right of any ship to transport liquor within the territorial waters of the United States.

Seventh. Defendants are further informed and believe and therefore allege that for two years last past a large and profitable business has been carried on by divers persons with the object and result of importing liquor into this country contrary to law; that the vessels used by such persons are vessels under foreign registry and such vessels sail from foreign ports with clearance papers showing that they are bound for other foreign ports. The actual destination of such vessels is not the port shown in their clearance papers but some point on the high seas near the coast of the United States from which its liquors are transferred to smaller boats which complete the smuggling and importation of the liquor into the United States. Up to the present time the vigilance of the customs officials in seizing such vessels when they came within the territorial limits of the United States has somewhat mitigated the evils of this traffic but if, as complainant contends it is only necessary to put liquors under lock and key to make such transportation legal and foreign vessels can sail our territorial waters at will with cargoes of liquor, the enforcement of the prohibition against the importation of liquors, already difficult, will become practically impossible.

Eighth. The rulings of the Secretary of the Treasury referred to in the bill of complaint have already been used as a cloak to hide smuggling operations and if the doctrine underlying such rulings is declared to be the law as claimed by complainant, defendants verily believe that its use as a cloak for such operations will greatly increase. As an instance of the use of such regulations to hide smuggling defendants allege that on or about January 15, 1920, the British passenger steamship "Harbinger" sailed from Halifax, N.S., for Havana, Cuba, carrying with her a large quantity of intoxicating liquors as sea stores. The said vessel came into the port of Portland, Maine, alleging a shortage of coal, and there her liquor was sealed under customs seals. Her Master protested her innocence and claimed the right as a foreign vessel to transport intoxicating liquors as sea stores under seal within the territorial waters of the United States. This right was accorded her under the Treasury rulings until recently in force and on which complainant has relied until now. Being under suspicion, however, the "Harbinger" was convoyed by the coastguard cutter "Ossipee" to Cape Ann whence she entered the port of Boston and thence proceeded without convoy

to the neighborhood of New York where she was met by the coast-guard cutter "Gresham" which convoyed her to New York. On January 26th, she was convoyed down New York Bay by the coastguard cutter "Manhattan" to Dunham Shipyard, Staten Island. There she remained under customs surveillance until February 6th when the customs seals on the liquors were broken by the crew and an attempt was made to import them into the United States. When such attempt was made the crew of said vessel were arrested. Two have pleaded guilty to a violation of the Prohibition Act and the vessel has been libelled by the Government. After the crew were arrested it became evident that the journey of this vessel down the coast of the United States was not, as alleged and as appeared, because of insufficient coal-carrying space but for the purpose of finding purchasers of the liquor carried as sea stores.

Ninth. Defendants further allege that under the regulations of the Secretary of the Treasury referred to in the complaint herein, customs officers have made no physical inventory of the stores of liquors on any foreign ships either upon their arrival in the ports of the United States or upon their leaving such ports. Permission has been given to remove certain of the liquors under seal for the purposes of rations given to the crews, but no record is kept of the

amount of liquor which actually leaves United States ports on foreign vessels, nor is any inventory returned by such foreign vessels of the amount of liquors actually found when seals are broken by the ship's agents after leaving port.

Tenth. Defendants are informed and verily believe that the complainant makes large profits from the sale of intoxicating liquors on the high seas, such profits amounting to many thousand dollars per annum and further allege that loss of such profit is the only definitely ascertainable loss which the complainant will suffer if the National Prohibition Act as interpreted by the ruling of the Attorney General is given full force and effect.

Eleventh. Defendants further allege on information and belief that the sale of intoxicating liquors on the high seas by vessels carrying the American flag ceased with the issuance of the ruling of the Attorney General and is not now carried on. And defendants verily believe that if vessels of foreign registry are by the injunction of this Court facilitated in the sale of liquor on the high seas by being allowed to transport liquor within the territorial waters of the United States, the resultant damage to the American merchant marine will be great and irreparable. Not only will ships of the American merchant marine suffer the loss of revenue which they have hitherto enjoyed from the sale of intoxicating liquors on the high seas and which ships of foreign nations will continue to enjoy if the prayer of the complainant herein is granted, but defendants believe that a large number of passengers who would otherwise travel on American ships and who would travel on American ships if both American ships and foreign ships were placed in the same position in regard to the sale of liquor on the high seas, will, if foreign ships are placed

27 in an advantageous position in this regard travel on foreign ships and the American ships will lose a large amount of revenue thereby. Defendants are informed and verily believe that the loss of such revenue from the sales of liquor and from passage money in case of a differential treatment giving preference to foreign ships over American ships in the matter of transportation of intoxicating liquors within the territorial waters of the United States, will be sufficient to make it impossible for the American merchant marine to compete profitably with ships of foreign registry. The majority of the American passenger lines operating in the North Atlantic trade, in competition with complainant's and other foreign vessels are owned and operated directly by the United States Government. Any loss of revenue by reason of a differential treatment favorable to foreign ships will fall directly on the United States Government and its taxpayers.

Wherefore, defendants pray that the bill of complaint herein be dismissed and that the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

WILLIAM HAYWARD,
*United States Attorney for the Southern
District of New York, Attorney for
Defendants.*

Office and P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

28 In the District Court of the United States for the Southern District of New York.

LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY,
LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

Stipulation.

The above entitled suit having been duly brought on for trial by consent of the parties, at a Stated Term of the United States District Court for the Southern District of New York, before the Honorable Learned Hand, District Judge, and a motion for a judgment on the pleadings having been made by the complainant, and the Court having heretofore, at a Stated Term thereof, held at the United States Post Office Building in the City of New York on the 17th day of October, 1922, before the Honorable Learned Hand, heard extended

argument of counsel upon a similar motion in like suits by the Oceanic Steam Navigation Company, Ltd., and other complainants, involving similar questions;

It is stipulated that the said motion for judgment in the above entitled suit be, and the same hereby is, forthwith submitted without further argument for consideration and decision by the
 29 Court, along with said suits of the Oceanic Steam Navigation Company, Ltd., and other complainants.

Dated, New York, October 19th, 1922.

BURLINGHAM, VEEDER, MASTEN &
 FEAREY,

Solicitors for Complainant.

WILLIAM HAYWARD,

*United States Attorney for the Southern District of
 New York, Solicitor for Defendants.*

30 & 31 [Endorsed:] E. 25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil and River Plate Steam Navigation Company, Ltd., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Stipulation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

32 In the District Court of the United States for the Southern District of New York.

LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY,
 LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States;
 Henry C. Stuart, Acting Collector of Customs for the Port of New York, and Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer.
 Defendants.

Restraining Order.

A motion having been made in the above entitled case for judgment on the pleadings, and by agreement between the parties submitted to the Court for determination, along with a similar motion made in the suit of The Oceanic Steam Navigation Company, Limited, against Andrew W. Mellon, and others, it is, on motion of Burlingham, Veeder, Masten & Fearey, Solicitors for the complainant,

Ordered that until the determination of said motion by entry of order thereon, the defendants, their successors, agents, servants and subordinates, and each of them, be, and hereby are, restrained from seizing, disturbing, removing or in any way interfering with wine

liquors or other intoxicating beverages on board complainant's ships as sea stores or medicines, as more particularly set forth in the said bill of complaint herein; from seizing, disturbing or in any way interfering with the complainant's ships by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages as ship's stores, as more particularly set forth in said bill of complaint, and from enforcing or attempting to enforce, or causing to be enforced against the complainant, its officers, agents or servants, or any of them, or any of its steamships, any of the pains, penalties, or forfeitures provided in and by the so-called National Prohibition Act enacted by Congress pursuant to the Eighteenth Amendment to the Federal Constitution; and from refusing to issue to complainant, or its steamers, permits for clearance from the Port of New York, or in any way interfering with the arrival or departure of any of the complainant's steamers, by reason of the carriage or presence thereon of wines, liquors or other intoxicating beverages, as said ship's stores, as more particularly set forth in the bill of complaint herein; and on like motion, it is further

Ordered that service of a copy of this order on the United States Attorney for the Southern District of New York shall be sufficient.

Dated, New York, October 21st, 1922.

LEARNED HAND,
United States District Judge.

44 & 35 [Endorsed:] E. 25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil and River Plate Steam Navigation Company, Complainant, vs. Andrew W. Mellon and others, Defendants. Copy. Restraining Order. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City. Oct. 21-22. William Hayward, U. S. Attorney, Att'y for Def'ts.

Sir: Take notice that the original of which the within is a copy, was this day duly filed herein in the office of the clerk of this Court.

Dated, New York, Oct. 21, 1922.

Yours, etc.

BURLINGHAM, VEEDER, MASTEN &
FEAREY,

Solicitors for Complainant.

27 William Street, Borough of Manhattan, New York City.

To Wm. Hayward, U. S. Att'y, Att'y for defendants.

36 United States District Court, Southern District of New York

THE CUNARD STEAMSHIP COMPANY, LTD., and ANCHOR LINE (HENDERSON BROTHERS), LTD.,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States
et al.,

And Ten Other Cases.

Opinion.

Oct. 23, 1922.

These cases come up upon motions by the defendants to dismiss the bills, and by the plaintiffs for final decrees upon the answers. The pleadings have been so drawn on both sides as to raise the merits of the controversy, and it is not necessary to set them forth in detail.

The facts are these: Since the enactment of the War Prohibition Act in October, 1919, which was followed in January, 1920, by the Eighteenth Amendment and the National Prohibition Act, it has been the continuous custom of all transatlantic passenger steamers to bring into the Port of New York limited stocks of wines and liquors as part of their sea-stores. This was done with the consent of the public authorities who promulgated regulations recognizing the practice, but providing that, while within the territorial waters of the United States, they should remain intact under seal. The theory on which the authorities proceeded, acting on an option at that time given by the Attorney General, was that, as part of the

37 ship's stores, these wines and liquors, if sealed and kept on board, were not to be regarded as brought within the country at all, or as subject to its municipal law, in accordance with the general rule that as respects what happens upon the deck of a foreign ship, the municipal law does not apply, except in cases where the peace of the sovereign is at stake. Later the permission so given was further extended to allow the ships to dispense to their crews their customary ration of wine, as was in some cases required by the laws of the country from which they came.

This being the posture of affairs, on May 15, 1922, the Supreme Court decided in the cases of *Grogan v. Walker*, and *Anchor Line v. Aldridge*, that the bare transit of liquors across the territory of the United States was transportation within the Eighteenth Amendment. Thereafter the present Attorney-General, after consideration, on October fifth, 1922, rendered an opinion to the Secretary of the Treasury that these decisions covered passenger steamers plying in and out of the ports of this country. The President thereupon publicly announced that after a given date he should proceed to execute the law in accordance with this opinion, and this created the situation out of which these bills arise.

The practice of all steamers has been freely to sell wines and liquors out of these stocks to their passengers on east-bound voyages when once outside the league limit, and to replenish them in Europe so that they should suffice for a round trip. The stocks in question are therefore carried into the Port, kept there under seal, and carried out again, only for the entertainment of passengers embarking from the United States. Besides the wines and liquors so used the steamers carry a stock for the use of their crews. In the case of the

French, Italian and Belgian ships the law of their flag requires them to supply a ration of wine and in those cases it is possible that the ships may not be able to obtain clearance unless they comply with this provision. Furthermore, the use of wines, beers or liquors among the peoples except Americans from whom the crews of all the ships are drawn, is habitual and these beverages are regarded as a necessary part of their ration.

Among the plaintiffs are two lines which sail under the American flag. These the authorities have always treated like the foreign lines; they have freely sold their wines and liquors at sea and brought them into port under the same restrictions and with the same privileges as the rest. They are now, however, subject to the same proposed action by the defendants.

The defendants are not the same in all the suits. In some cases the Secretary of the Treasury is joined, in some the United States Attorney for the Southern District of New York, and in some the Port Officer, but the Collector of the Port of New York and the local prohibition Director are defendants in all.

Appearances:

Hon. Van Vechten Veeder, for Oceanic Steam Navigation Co., Ltd., Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., United Steamship Co. of Copenhagen, The Royal Mail Steam Packet Co., The Netherlands American Steamship Co., (Holland America Line) and Pacific Steam Navigation Company.

Lucius H. Beers, Esq., for the Cunard Steamship Co., Ltd., and Anchor Line (Henderson Brothers).

Joseph P. Nolan, Esq., for Compagnie Generale Transatlantique.

Reid L. Carr, Esq., for United American Lines, et al.

Cleatus Keating, Esq. and John M. Woolsey, Esq., for International Mercantile Marine and International Navigation Co., Ltd.

William Hayward, Esq., United States Attorney and John Holley Mack, Esq., Assistant U. S. Attorney, for Defendants in all cases.

LEARNED HAND, D. J.:

It is conceded, and indeed could not be disputed, after *Grogan Walker and Anchor Line v. Aldridge*, decided May 15, 1922, that had the liquors here in question been a part of the ships' cargo, the bills would not lie. It makes no difference that they were not beached while carried within territory of the United States; carriage would be transportation none the less. But because they are part of the ships' stores, in the sense that that term is gen-

erally understood, the plaintiffs argue that they do not fall within the same rule. This argument rests upon two alternative premises, first, that "transportation" involves a place where, and a person to whom, the goods are to be delivered, and second, that a ship's stores have by long custom been treated as a part of the "furniture," *Brough v. Whitmore*, 4 Term R. 206, or "appurtenances," *The Dundee*, 1 Hagg. Adm. 109, of the ship, which do not without particular mention become subject to the municipal law of the ports into which she enters, any more than the ship herself.

Even if "transportation" were defined to involve some delivery, I do not see how that would help the plaintiffs. These liquors are carried for delivery at sea to the passengers and crew, and when so delivered their transportation ends. There appears to me no significant distinction in the fact that the place of delivery is the ship itself. The passengers, and for that matter, the crew, are not the same person as the owner, and if the passage of title or possession has anything to do with the matter, the title to, and possession of, the bottle or the dram, passes when it is handed to its consumer. The carriage within the limits of the Port of New York is a part of a transit whose purpose from the beginning is that very
40 delivery. The fact that the place and the person are undefined is as irrelevant as it would be if a collier cleared to search out and coal at sea friendly cruisers during war, as happened in 1914.

Therefore, I might admit the plaintiffs' interpretation of the word, if it were necessary. Nevertheless, it seems to me at best very doubtful whether it carries with it any such limitation. The cases in which the plaintiffs rely come only to this, that the jurisdiction of the United States under the interstate commerce clause does not terminate until delivery after a transit across State lines, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, *Rhodes v. Iowa*, 170 U. S. 412, *Louisville & Nashville R. R. v. Cook Brewing Co.*, 223 U. S. 70, *Danciger v. Cooley*, 248 U. S. 319. From this it does not follow that the term "transportation," as used in this statute, implies delivery to another than the person who carries the liquors. Suppose, for example, a parcel of liquor, made after the Amendment, and carried off to be laid away in a cache. There can be no question, I believe, that two separate crimes would be committed, "manufacture" and "transportation."

Nor does it seem to me that the thirteenth and fourteenth sections of Title II of the Prohibition Act, help the plaintiffs. Under these carriers are required to mark the consignor's and consignee's name on the outside of all packages. But it does not follow that a regulation like this of one kind of transportation imputes to the word itself any of the conditions which it enacts. In common use to transport means to carry about, and I see no reason why it should mean less in Section three. The law clearly intended by immobilizing liquors to make surreptitious traffic in it impossible and its police
41 would as well cover movements which might be incidental to as those which immediately terminated in, a delivery to some one else. The case of *Street v. Lincoln Safe Deposit Company*, 25

U. S. 88, did not decide anything to the contrary; it turned upon the fact that the possession of the liquor in the leased room and in the house were both lawful, and that the movement from one to the other could not be unlawful. To apply it to the cases at bar is to beg the question, because the lawfulness of the possession here depends upon whether this is transportation under the statute. The steamers have no express warrant of law, as Street had, for the possession of the liquor. I conclude therefore that the carriage in question is "transportation."

The first point being thus disposed of, I come to the second. It is a very plausible argument to say that ship's stores ought not to fall within the general language of Section three; so plausible indeed that for three years it prevailed with the authorities charged with the enforcement of the statute. Their understanding is not to be ignored in interpreting the law itself, under well-settled canons. Since 1799 it has been recognized in the customs regulations of the United States, (Revised Statutes, Sections 2795, 2796, 2797), that reasonable sea-stores shall not be subject to duty. While they must be manifested and may not be excessive in quantity, as such they are not regarded as entering into the commerce of the country. The plaintiffs say that, therefore, when Section three of the National Prohibition Act forbade generally the transportation of liquors, it must be read in the light of this statute and the long usage under it, and that what is not within the United States for the purposes of customs ought not to be so for purposes of prohibition. In addition they urge that under the maritime law it is held that for most purposes sea-stores will be treated as a part of the ship herself. If she is not regarded as being within the country, neither ought the accessories to her voyage.

It is of course true that one should not interpret a statute, and least of all a constitution, with the text in one hand and a dictionary in the other, and so courts have often held in similar cases to these, *Brown v. Duchesne*, 19 How. 123, *Taylor v. U. S.*, 207 U. S. 120, *Scharrenberg v. Dollar Steamship Co.*, 245 U. S. 122. Nevertheless, everyone must agree that the question is no more than one of interpretation, for in the cases at bar Congress certainly might, if it chose, prevent the entrance of any liquor whatever within the borders of the United States, not only under the Eighteenth Amendment, but indeed under its power over foreign commerce. It is a question, therefore, of the implied limitations upon words which literally in any event cover the case.

Grogan v. Walker, supra, and *Anchor Line v. Aldridge*, supra, plainly meant to adopt a broad canon for the interpretation of the National Prohibition Act, following the admonition at the end of the first paragraph of Section three. Effecting a revolutionary reform in the habits of the nation, the statute is to be understood as thorough-going in its intent to accomplish the results desired. It did not specify the extent of its application in detail, but left that to be gathered from its occasion, and the generality of the words used. It intended to exercise once for all the complete power of Congress under the Amendment, and its very want of particularity is a good index

that it meant to cover what it could. For this reason it is to be distinguished from earlier local acts of the same kind, as for example, the Alaskan Prohibition Act, upon the language of Section twenty-nine on which the plaintiffs rely. Indeed, specification in the statute might have defeated its ends, on the theory that what was omitted must be taken as excluded. At least I cannot read the two decisions cited without supposing that it was in the foregoing sense that the Supreme Court meant section three to be read.

Starting with that premise there appears to me more reason for supposing that section to cover these ship's stores than the transportation there before the court. I say this because it was necessary to overrule at least as much, if not more, to reach the result in those decisions, and especially because there were in them much stronger reasons to imply an exception from the literal language of the act. First, in those cases there was a statute which gave as much right of transit across the territory of the United States as here, and that statute had the support of a treaty negotiated only five years later, and assumed in the opinion of Mr. Justice Holmes to be still in force. Assuming that the customs laws give a positive right to enter ship's stores into the United States, a position in itself very doubtful, since in form it only exempted them from customs duties, at least it must be conceded that the statute, old as it is, represented only the policy, and not the promise, of the nation. It is true that the custom in maritime affairs is of long standing to treat such stores as a part of the ship, but balancing that consideration with the implication against the repeal of a treaty, I cannot help believing that the second is the more weighty. At best it can only be said that the cases are on a parity in this regard.

44 However, the motives for positively assuming that such stores must be considered as included within Section three appear to me stronger than any which could apply to a bare carriage across our territory. It is true that all such reasoning as to legislative motives is speculative, but that vice, if it be one, is of the plaintiffs' making, because the language of the statute taken in its natural meaning is general and covers the case of stores, as of other merchandise. It is the plaintiffs who insist upon implying limitations on that meaning, because of the supposed intent of Congress. Since, therefore, I am asked to have a recourse to implications, I cannot avoid some speculation as to what Congress would probably have said, had it been faced with the actual situation which now arises.

In the decisions cited there was no conceivable danger in the transit of liquor across the United States except the chance of its escape. It is true that as suggested in *Grogan v. Walker*, supra, the provision against export may have been intended to prevent the use of stimulants outside the United States and so far as it was, the argument applies with stronger force to the cases at bar. But taken substantially, the only evil which the transit could accomplish was that some of the liquor should not complete its passage. In the cases at bar the danger of an escape is equally present, not perhaps in the case of these plaintiffs, but I cannot regard them alone. Less responsi-

sible owners may not be as scrupulous, and the law runs for all. The distinction which puts these cases within the law with much greater certainty is the purpose for which the liquors are brought and kept here. Ignoring for the moment the crews, all of the stocks
 45 are avowedly intended for the consumption of those who are now within the United States, of which a substantial part are residents or citizens, the very persons whom it was the whole purpose of the Amendment to prevent drinking liquors.

Naturally I have nothing to say about the wisdom of the Amendment or the law, but, wise or not, one thing is clear, that a drink of whisky is as hurtful to health and morals outside as inside Ambrose Light. It appears to me inconceivable, when one is discussing the implied intent of Congress, that a statute cast in such sweeping terms should be read as indifferent to open preparations within the United States for the gratification by its citizens of exactly those appetites which it was the avowed intent of the statute altogether to deny. Nor do I believe that anyone would hesitate to think so who did not already repudiate the whole reform. If, for example, we were to substitute cocaine or opium for alcohol, I can scarcely think there could be any disinterested difference of opinion. Suppose it were the habit of Chinese vessels to bring to our ports among their stores a proper supply of morphine and opium with the avowed purpose of dispensing it freely to passengers from the United States as soon as they cleared the league limit. Could it be seriously argued that a constitutional amendment and a statute in broad language designed to prevent citizens from using this drug did not cover so palpable a means of nullifying the very purpose of the law? The illustration is extreme only to those who can see no parity between the evils of opium and alcohol. But a judge cannot take any position on that question; it must be enough for him that each is forbidden.

46 It is indeed different with so much of the stocks as are kept for the crews, and a much stronger argument can be made for the legality of their carriage, though these also seem to me to fall within the decisions I have so often cited. However, that question is really irrelevant as these cases are presented. The plaintiffs base their argument on the improbability that a statute in such general words should have meant to cover sea stores. This in turn rests upon the unlikelihood that what has been for so long treated as not subject to municipal law should all at once become so. But the argument breaks down as soon as it appears that the stores as a whole cannot fairly be excluded. To say that the section covered some of such stores, but not all, would be to admit that as such they were not excluded by implication. What then becomes of the argument? There are indeed cogent reasons why these might be excepted, but these are not because they are ships' stores. Congress may indeed determine to make an exception in their favor, as to the validity of which I have nothing to say, but I do not think that a judge can imply the exception because of the unquestioned difficulties in which its absence leaves the plaintiffs. There is a narrow limit to judicial redrafting of statutes. Indeed, the argument was not suggested at the bar that passengers' refreshment and

crews' rations stood in different positions. Probably none was intended, and I mention it only against the possibility that it might be taken later.

Cases like *Brown v. Duchesne*, supra, *Taylor v. U. S.*, supra, and *Scharrenberg v. U. S.*, supra, are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by

47 implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning of Section three accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is *sui generis*, and I have only to follow any decision which is apt to the statute under consideration. For these reasons I hold that the threatened action of the defendants is legal and that the bills must be dismissed.

It is obvious that this ruling disposes of the cases of the American ships as well as of the foreign. The American bills contain no allegations that the defendants intend to prosecute them for the sale of liquors upon the high seas, as for example on westward voyages. It is true that the prayers for relief do include so much, but prayers without allegations are ineffective. I do not therefore find it necessary to consider the legality of any sales of liquor under the American flag on the high seas, assuming no liquor is brought within our territorial limits. It was my understanding at the argument that the territoriality of an American ship at sea was discussed only against the possibility that I should hold that it was not illegal merely to carry liquors into and out of the Port.

I suppose that the question of a temporary restraining order pending the appeal is of a good deal more consequence to the plaintiffs than anything I may think about the law. The power under

48 the Seventy-fourth Rule to grant such an order is undoubted notwithstanding a dismissal of the bill, *Merriam River Savings Bank v. City of Clay Center*, 219 U. S. 527, *Staffords v. King*, 90 Fed. R. 136 (C. C. A.). Moreover, the whole thing rests in the discretion of the trial judge. The question is how far the absence of any protection to the losing party will expose him to serious and irreparable damage, if in the end he wins, without imposing an equal damage upon the other party, if he holds his decree. Like all such matters, it depends upon a balance between the two, and must assume that the chances of success are not equal.

On the one hand the plaintiffs are in unquestionable embarrassment. They must take off their stocks of liquor now in port, and if they bring any westward with them they must calculate with some nicety on the consuming capacities of their passengers or take the chances of a seizure of the residue in New York. Nevertheless so far as the loss of the liquors themselves is concerned the damage cannot be said to be irreparable. These must be condemned before they can be forfeited, and in the present state of the calendars the

cases at bar will be finally determined long before such libels can be tried. If I am wrong, the plaintiffs will get back their property after a delay which I cannot regard as an irreparable damage. If I am right, it would be obviously improper by staying the defendants to allow the liquor to escape a seizure to which the United States is entitled under its laws. With the conduct of any such proceedings I have nothing to do. It may be that the long acquiescence of the authorities in the practices here in question will moderate the ultimate penalty of confiscation; I must assume that the plaintiffs will receive such consideration as the law permits, but I ought not to protect them against proceedings to which they by hypothesis would be legally subject.

However, I do not understand that they are so much concerned over the possible loss of existing stocks as over the right meanwhile to carry them in and out as a means of selling them at sea and serving them as part of the crews' ration. If the ration is cut off, some in any case of the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on upon a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the Eighteenth Amendment. It appears to me just on a fair balance of the relative advantages to stay the enforcement of the law against stocks of wine and liquor necessary for crews' rations, if honestly kept and dispensed for that purpose alone.

As to the maintenance of Passengers' stocks the case is otherwise. The plaintiffs are all upon the same competitive footing inter se and only claim to fear the competition of Canadian lines. How serious that may be no one can tell, but certainly it will be felt much less during the next two or three months than at another season. In any event, on the balance of advantage I ought not to allow it. It is easy to say, if one does not take seriously the opinion behind the Amendment, that the United States will not suffer by the continuance of the status quo. But it is impossible to say so, if one does. I repeat what I said in *Dryfoos v. Edwards*, filed October 10, 1919, on a similar occasion. The suspension of a law of the United States, especially a law in execution of a constitutional amendment, is of itself an irreparable injury which no judge has the right to ignore. The public purposes, which the law was intended to execute, have behind them the deep convictions of thousands of persons whose will should not be thwarted in what they conceive to be for the public good. No reparation is possible if it is.

Furthermore, it is at best a delicate matter for a judge to tie the hands of other public officers in the execution of their duties as they understand them, and the books are full of admonitions against doing so, except in a very clear case. Here not only is the case not clear, but, so far as I can judge the plaintiffs have no case. Therefore I will go no further than to issue an injunction against interfering with the carriage of a stock necessary for the crews' rations

on the east-bound voyage. The plaintiffs must each give a bond in the sum of twenty-five thousand dollars, conditional against the use of such stocks for any other purpose than as crews' rations.

Bill dismissed with costs; injunctions as indicated pending an appeal if the same be taken at once. Settle orders on notice.

LEARNED HAND,

D. J.

October 23, 1922.

51 At a Stated Term of the District Court of the United States for the Southern District of New York Held in the Court Rooms Thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 25th Day of October, 1922.

Present: Hon. Learned Hand, District Judge.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer. Defendants.

Final Decree.

October 25, 1922.

This cause came on to be heard at this term upon motions by the defendants to dismiss the bill of complaint and by the complainant for a final decree in its favor on the pleadings, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the bill of complaint herein be dismissed and defendants have judgment against the complainant for their costs to be taxed, and it is further

Ordered, adjudged and decreed that until final hearing of this cause in the Supreme Court of the United States and the entry of an order or decree on the mandate of that Court, the defendants

52 their servants, agents and subordinates, be and they hereby are stayed and restrained from seizing or interfering with the possession or carriage by complainant herein of a stock of liquors customary for the rations of the crews of complainant's vessels upon each eastbound voyage, upon the filing of a bond in the sum of twenty-five thousand dollars (\$25,000), conditioned against the gift, issuance or sale of such stock of liquors by complainant otherwise than as crews' rations to the crews of complainant's vessels and it is further

Ordered, adjudged and decreed that if complainant shall fail to take an appeal herein to the Supreme Court of the United States

within five days from the entry hereof, or to move for preference on the first motion day of the Supreme Court, the defendants may move herein to vacate the injunction granted above.

LEARNED HAND,
U. S. D. J.

53 & 54 [Endorsed:] E. 25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, Henry C. Stuart, Acting Collector of the Customs for the Port of New York, Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants. Copy. Final Decree. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

55 In the District Court of the United States for the Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

Assignment of Errors.

The complainant hereby assigns error in the final judgment or decree of the District Court herein entered October 25th, 1922, in the following respects:

First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in denying the petition for an injunction.

Third. The Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits a foreign ship from keeping on board while on the territorial waters of the United States intoxicating beverages constituting part of the customary sea stores of such ship lawfully acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fourth. The Court erred in holding that the National Prohibition Act prohibits a foreign ship from keeping on board, while on the territorial waters of the United States, intoxicating beverages constituting part of the customary sea stores of such ship lawfully

56 acquired by it in a foreign jurisdiction and on board solely for the lawful use and consumption thereof on board said ship outside of the jurisdiction of the United States.

Fifth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the crew as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Sixth. The Court erred in holding that the Eighteenth Amendment and the National Prohibition Act prohibit a foreign ship from having on board as sea stores while on the territorial waters of the United States such intoxicating beverages as are required for the passengers as part of their customary rations by the law of the ship's flag or by the law of the nation to or from whose ports the vessel is trading when said sea stores were lawfully acquired and taken on board for such purpose in a foreign country.

Seventh. That the National Prohibition Act as construed and applied by the District Court is unconstitutional and void because enforcement thereof with respect to sea stores on the complainant's vessels would deprive the complainant of its property and subject it to penalties without due process of law.

Eighth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the third and fourth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Ninth. The Court erred in holding that the keeping on board of complainant's vessels of intoxicating beverages while said vessels are on the territorial waters of the United States in the circumstances mentioned in the fifth and sixth assignments of error constitutes a transportation of the same within the prohibition of the Eighteenth Amendment and the National Prohibition Act.

Tenth. The Court erred in holding that the possession within the territorial waters of the United States of intoxicating beverages in the circumstances mentioned in the third, fourth, fifth and sixth assignments of error is prohibited by the Eighteenth Amendment and the National Prohibition Act.

Eleventh. The Court erred in refusing to hold that the interpretation of the National Prohibition Act mentioned in the ninth assignment of error was unconstitutional and invalid and not within the powers conferred by Congress by the Constitution.

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Wherefore complainant-appellant prays that said decree or judgment of the United States District Court for the Southern District of New York be reversed and an injunction granted the complainant as prayed for in the bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &
FEAREY,

Solicitors for Complainant.

58 & 59 [Endorsed:] E. 25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants. Assignment of Errors. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

60 In the District Court of the United States for the Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY,
LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

Petition for Appeal and Allowance.

The complainant above named, Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., conceiving itself aggrieved by the final judgment and decree entered herein October 25, 1922, does hereby appeal from said final judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this case is appealable directly from this court to the said Supreme Court under Section 238 of the Judicial Code, and said Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., prays that it be allowed this appeal and that a transcript of the record papers and proceedings upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &
FEAREY,

Solicitors for Complainant.

The foregoing appeal is hereby allowed as prayed for.

LEARNED HAND,
U. S. D. J.

To Hon. William Hayward, United States Attorney; Alexander Gilchrist, Jr., Esq., Clerk, United States District Court, Southern District of New York.

61 & 62 [Endorsed:] E. 25-33. District Court of the United States, Southern District of New York. Liverpool, Brazil & River Plate Steam Navigation Co., Ltd., Complainant, against Andrew W. Mellon, Secretary of the Treasury of the United States, et al., Defendants. Copy. Petition for Appeal. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, New York City.

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Citation on Appeal.

By the Honorable Learned Hand, One of the United States District Judges for the Southern District of New York, in the Second Circuit.

To Andrew W. Mellon, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at Washington, in the District of Columbia on the 20th day of November, 1922, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., is complainant and you are defendants to show cause, if any there be, why the decree in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 25th day of October, in the year of our Lord One Thousand Nine Hundred and twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

LEARNED HAND,
*United States Judge for the Southern District
of New York, in the Second Circuit.*

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[Endorsed:] E. 25-33. United States District Court, Southern District of New York. Liverpool, Brazil & River Plate Steam Navigation Company, Ltd., Complainant, against Andrew W.

Mellon, Secretary of the Treasury of the United States, et al., Defendants. Citation. Burlingham, Veeder, Masten & Fearey, Solicitors for Complainant, 27 William Street, Borough of Manhattan, City of New York.

65 In the District Court of the United States for the Southern District of New York.

LIVERPOOL, BRAZIL & RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Complainant,

against

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

Stipulation.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of said District Court in the above entitled matter as agreed on by the parties.

Dated New York, October 25, 1922.

BURLINGHAM, VEEDER, MASTEN &
FEAREY,

Solicitors for Complainant.

WM. HAYWARD,

U. S. Atty., Attorney for Defendants.

66 UNITED STATES OF AMERICA,
Southern District of New York, ss:

LIVERPOOL, BRAZIL AND RIVER PLATE STEAM NAVIGATION COMPANY, LTD., Complainant,

vs.

ANDREW W. MELLON, Secretary of the Treasury of the United States; Henry C. Stuart, Acting Collector of the Customs for the Port of New York; Ralph A. Day, Federal Prohibition Director for the State of New York, and John D. Appleby, Chief Zone Officer, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 25th day of October in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of the District Court of the United States, Southern District of N. Y.]

ALEX GILCHRIST, JR.,
Clerk.

Endorsed on cover: File No. 29,217. S. New York D. C. U. S. Term No. 667. Liverpool, Brazil and River Plate Steam Navigation Company, Limited, Appellant, vs. Andrew W. Mellon, Secretary of the Treasury of the United States, et al. Filed October 27th, 1922. File No. 29,217.

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